No. 41.

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United States Supreme Court.

No. 41.—OCTOBER TERM, 1897.

BENTON TURNER, Plaintiff-in-Error, *against* THE PEOPLE OF THE STATE OF NEW YORK, Defendant-in-Error.	Error to New York Court of Appeals.

Petition for Rehearing or to Modify Judgment.

To the Honorable the Supreme Court of the United States:

The said Benton Turner, the plaintiff-in-error, comes now and respectfully petitions this Honorable Court for a rehearing of the above-entitled cause, or, in the alternative, for a modification of the judgment of affirmance rendered herein by this Court on October 18, 1897, so as to provide that such judgment shall be without prejudice to any application or motion which he may be advised to make in the courts of the State of New York for a re-argument of this cause therein upon questions of purely local and State law, for the following reasons, to wit:

Because this Court, as shown by the opinion of Mr. Justice Gray, assumes the Court of Appeals of New York to have decided that by the law of the State the plaintiff-in-error had the right, during the six months allowed by the limitation law, the validity of which was drawn in question before this Court, to assert his rights against the State in one or the other of three ways:

(1) By application to the Comptroller to cancel the tax sale;

(2) By ejectment against the Comptroller;

(3) By ejectment against the Forest Commissioners.

Your petitioner respectfully suggests that this assumption as to the law of New York is a mistaken one; that the New York Court of Appeals has not so decided, and that, by the true construction of the laws of that State, neither one of these three assumed remedies existed in his favor. *First*—The remedy by cancellation, which was asserted by the New York Court of Appeals in rendering the judgment in this action, has since been denied by that Court. *Second*—The remedy by ejectment against the Comptroller presupposes that he was in possession of the land, but the record in this cause shows that such was not the fact. *Third*—The remedy by action against the Forest Commission has not yet been allowed by any New York Court. It presupposes the existence of such Commission, when in fact such Commission was not appointed until nearly four months after the passage of the limitation law in question.

Your petitioner further alleges that, on the argument of this cause in the New York Court of Appeals, the question of the right or possibility under the law of that State of bringing an action of ejectment against the Forest Commission to recover lands claimed by the State was not at all argued by his counsel; that up to that time no such

claim had ever been made, to his knowledge, or that of his counsel; that the judgment of the New York Court of Appeals in this action was understood by counsel to proceed upon the theory that the plaintiff-in-error might have applied to the Comptroller to cancel, which doctrine that Court has since denied. If now the judgment of the New York Court of Appeals is to be held to have proceeded on a different theory, and to have decided that plaintiff-in-error might have brought his action of ejectment against the Forest Commission, then a proper case is presented under the rules of the New York Court of Appeals for a re-argument of the cause, for the reason that such theory of this case was not argued by counsel, and a fact material to that aspect of the case was not brought to the attention of the Court, but was overlooked by both counsel and Court, namely, that during four of the six months in question there was no Forest Commission.

Your petitioner therefore prays that an order may be made for a re-hearing of the argument in this case on a day to be appointed by this Court, or else that the judgment of affirmance rendered herein be modified either by making it a judgment of dismissal simply or else by inserting in it a provision that it is without prejudice to the right of the plaintiff-in-error to move in the New York Court of Appeals for a re-argument of the cause in that Court upon questions of purely local law.

Dated New York, November 8, 1897.

Benton Turner,

By Frank E. Smith,
Counsel.

I hereby certify that I am counsel for the plaintiff-in-error in the above-entitled cause, and that the foregoing petition for a re-hearing of this cause, or, in the alternative,

for a modification of the judgment of this Court herein, is, in my opinion, well founded in point of law.

Dated November 8, 1897.

FRANK E. SMITH,
Counsel for Plaintiff-in-Error,
No. 21 Courtlandt Street,
New York.

To Hon. T. E. HANCOCK,
Attorney-General of the State of New York :

SIR—You will please take notice that on the 15th day of November, 1897, the petition and motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States, at the court-room thereof, in the Capitol at Washington, at the opening of the Court on that day, and a motion will then and there be made for leave to file the same and that the prayer of said petition be granted.

Annexed hereto is a copy of my brief or argument in support of the motion.

Dated November 8, 1897.

FRANK E. SMITH,
Counsel for Plaintiff-in-error.

Brief in Support of Petition for a Rehearing or to Modify the Judgment.

This is a writ of error to the New York Court of Appeals. It was argued in April, 1897, and decided October 18, 1897, and the judgment of the New York Court of Appeals affirmed. The mandate has not yet gone to the State Court.

The plaintiff-in-error now asks this Court to grant a rehearing or to so frame its judgment as to allow him to apply to the State Court for a reargument.

The only question which was presented to the Court related to the validity of a New York statute passed June 9, 1885, making tax deeds theretofore executed and which and been on record for two years conclusive evidence of their own validity, after the expiration of six months from the passage of the act.

The plaintiff-in-error challenged the validity of this law when set up by the State in its own favor, because during the six months he had no opportunity to assert his rights against the State.

The New York Court of Appeals held that he had such opportunity because he might have made an application to the Comptroller to cancel the illegal sale.

People *vs.* Turner, 145 N. Y., 451.

While the appeal to this Court was pending the New York Court of Appeals, in another case in which the action of the Comptroller in refusing to cancel an illegal sale was directly before the Court, held that the Comptroller had no such power on the application of the land-owner.

People *ex rel.* Millard *vs.* Roberts, 151 N. Y., 540.

Upon the argument of this cause one of the Justices of this Court asked the learned Attorney-General what the

remedy of the land-owner was during the six months allowed by the new limitation law, to which he responded, an action of ejectment against the Forest Commission.

In the opinion of this Court, delivered by Mr. Justice Gray, it is said :

> " From the judgments of the Court of Appeals in " the case at bar, and in the subsequent case of *People* " vs. *Roberts*, 151 N. Y., 540, there would appear " to have been some difference of opinion in that " court upon the question whether his proper rem- " edy was by direct application to the comptroller " to cancel the sale, or by action of ejectment against " the comptroller or the forest commissioners. But " as that Court has uniformly held that he had a " remedy, it is not for us to determine what that " remedy was under the local constitution and laws."

It would seem, from this opinion, that this case has been decided by this court upon the *assumption* that the plaintiff in error had a remedy by the local laws against the State before the bar of the new limitation law fell, but what that remedy was this court does not determine.

The vital point in the case is, therefore, the existence of one of these three alleged remedies under *State law*. This the court does not decide but takes for granted.

It is respectfully submitted that the New York Court of Appeals has not yet decided that any one of these three remedies existed. It did decide, in rendering the judgment now under review, that the Comptroller had power to cancel in such a case as the present, but it has since denied this, and its last decision is *against* the existence of such a remedy.

The remedy by action of ejectment against the Comptroller is denied by the findings of fact contained in the record—the Comptroller was not in possession and could

not be ejected (Record, p. 10, Par. IX.). There remains only the action of ejectment against the Forest Commission. No such action has ever, to the knowledge of counsel, been brought to trial, and certainly there is no direct adjudication by any court of the State of New York that such an action could or can be maintained.

If the judgment in this case is to be made to rest on the assumed existence of *such* a remedy by the State law, this court ought to have better authority for its existence than the assertion of the Attorney-General or certain *dicta* to be found in recent opinions.

The question of the right of a person who, between June and December, 1885, claimed land in the Forest Counties, to bring an action of ejectment against the Forest Commissioners has never, to the knowledge of counsel, been decided by the New York Court of Appeals, unless the judgment now under review can be said to have proceeded on that ground. If it did, then under the rules and practice of the New York Court of Appeals, there are good grounds upon which to apply to that court for a re-argument, as the attention of the court was not directed to the fact that during four of the six months in question *there was no Forest Commission*—that it was not appointed until September 14, 1885 (see Schenck *vs.* Peay; Woolworth's Circuit Ct. Rep., 175). Counsel for plaintiff in error was not aware of this fact when this case was argued in the Court of Appeals, and that court was not informed of and plainly did not consider that aspect of the case.

We therefore ask the court, if it declines to itself rehear the cause, to so frame its judgment as to allow a motion for re-argument to be made to the New York Court of Appeals.

It may be that such a modification is unnecessary, as on writ of error to a State Court the whole case is not brought

here for review, but only the rulings of the State Court with respect to Federal questions.

Murdock *vs.* City of Memphis, 20 Wall., 590.

Judgment of affirmance, which is, of course, final and conclusive upon all the questions which this court is authorized to review, ought not to preclude the State Court from correcting its own error as to State law.

The cause having been disposed of on the theory that the questions in the case were primarily questions of State law, the logical course would seem to be to dismiss the writ of error.

Bacon *vs.* Texas, 163 U. S., 207.

We therefore respectfully ask that a re-hearing be granted or the judgment modified by making it a dismissal simply, or if an affirmance, then that it be without prejudice to a motion for re-argument in the State Court on questions of State law.

Respectfully submitted,

FRANK E. SMITH,
Counsel for Plaintiff-in-Error.

[A copy of above petition, motion and brief was served on the Attorney-General of the State of New York on November 9, 1897, as appears by the proof of such service filed with the original.]